In The United States Court of Appeals
For the Ninth Circuit

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APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

I. STATEMENT OF JURISDICTION

On September 15, 1948, the Appellee Oscar Virgil Haynes filed his complaint in the District Court of the United States for the Western District of Washington, Northern Division, No. 2096 (R. 2-8) wherein he sought to recover the sum of $250,000 for personal injuries alleged to have been caused by the negligence of the appellant Pennsylvania Salt Mfg. Co., Inc.

It is alleged in paragraph 1 of said complaint that the appellant is a Delaware Corporation and as such is a citizen of the State of Delaware; that it has qualified to do business in the State of Washington, and that it has a resident agent in Seattle, Washington (R. 3). It is alleged in paragraph II of the complaint that the appellee is a resident of Seattle, Washington. It is alleged in paragraph 3 of the complaint that the appellant at all times mentioned in the complaint has

maintained a manufacturing plant at Tacoma, Washington (R. 3). Although the complaint contains no reference to statutes conferring jurisdiction of the cause upon the District Court of the United States for the Western District of Washington, Northern Division, it is presumed that such jurisdiction was conferred by the provisions of the United States Code, Title 28, Section 41(1), Judicial Code Section 24, 28 U.S.C.A. Sec. 1332.

The jurisdiction of this court to review the judgment of the district court is conferred by the provisions of U. S. Code, Section 225, Judicial Code, Section 128, U.S.C.A. (1949 Ed.) Section 1291.

II. STATEMENT OF THE CASE

(a) Pleadings.

The complaint (R. 2-8) in addition to the jurisdictional allegations, sets forth that the appellant is engaged in the operation of a manufacturing plant wherein it manufactures and processes chemicals (R. 3). That in the operation of said plant it uses iron pipes containing various types of chemicals in the manufacturing and processing of chemicals; that in February, 1948, the appellant sold certain scrap iron to one Frank Powser. Included among such scrap iron was a coil of pipe which the said Frank Powser received at the plant of the appellant and transported to his salvage yard in Tacoma, Washington; that on February 20, 1948, the appellee Haynes was employed as a truck driver by B. Radinsky & Son, salvage dealers, of Seattle, Washington (R. 4). That upon said date he was directed to proceed to Frank Powser's

salvage yard to pick up a load of scrap iron and scrap pipe, among which was the coil of pipe referred to above (R. 5). That said coil of pipe was loaded onto the truck which was driven by appellee Haynes, and that in order to place the coil in the proper position on the truck the appellee proceeded to pound it with a maul whereupon a pressurized stream of a corrosive substance issued from the pipe and struck the appellee on the face, arms, neck and eyes (R. 5, 6); that by reason of the corrosive chemical substance issuing from the coil of pipe, coming into contact with the appellee's eyes, the appellee suffered a complete loss of vision in the left eye and almost total loss of vision of the right eye; that he also sustained severe burns upon his face and neck.

Paragraph VII of the complaint (R. 7) is as follows:

> "That the said negligence of the defendant consisted of the following:
>
> "a. Failing to ascertain that all corrosives and substances injurious to other persons upon contact had been removed from said coil of pipe or neutralized before allowing said coil of pipe to be removed from the premises of the defendant to be placed as scrap metal into the stream of commerce where it was certain to be handled by other persons unaware of its dangerous propensities.
>
> "b. Failing to remove all corrosives and substances injurious to humans from said coil of pipe immediately upon removing said coil of pipe from its operating system.
>
> "c. Selling and delivering a coil of pipe containing a corrosive substance highly injurious to other persons upon contact, without having

warned the persons to whom the said pipe was sold and delivered, of the presence of dangerous substances in said coil of pipe."

The complaint further sets forth that the appellee was, prior to his injuries, a strong, able-bodied man, capable of earning the sum of $300 per month and that as a result of his injuries he has sustained damages in the sum of $250,000 (R. 7, 8).

The appellant's answer admitted the jurisdictional allegations, admitted the operation of the plant, and the use of coils of pipe within its plant; admitted the sale of the coil of pipe to Frank Powser, admitted the employment of the plaintiff in the capacity of a truck driver by B. Radinsky & Son; admitted that the plaintiff had driven a truck to the salvage yard of Frank Powser for the purpose of picking up a load of scrap including the said coil of pipe, and further admitted that while in the act of loading the pipe the plaintiff sustained injuries. The other allegations of the complaint were denied, and the allegations of paragraph 7 of the complaint relative to the alleged negligence of the appellant were specifically denied.

The appellant's answer further contained the following affirmative defense:

I.

"That at all times mentioned in the plaintiff's complaint herein the plaintiff was a workman engaged in extra hazardous employment as the said term is defined in Remington's Revised Statutes of Washington, Section 7675, and that the injuries sustained by the plaintiff, if any such injuries were sustained, were sustained while the

plaintiff was engaged as a workman in such extra hazardous employment.

II.

"That at all times mentioned in the plaintiff's complaint the defendant was an employer of workmen engaged in extra hazardous employment as defined under the aforementioned statute, and at the time of the accident which was alleged to have occurred as set forth in plaintiff's complaint the defendant as such employer was engaged in extra hazardous employment as defined by said Act, and at all such times the defendant, as such an employer, was a contributor to the Workmen's Compensation Fund.

III.

"That the purported negligent act or omission which is alleged by the plaintiff to have been the proximate cause of the plaintiff's alleged injuries was directly connected with extra hazardous employment and business then being carried on by the defendant as an employer, and that at said time the employer was a contributor to the Workmen's Compensation Fund of the State of Washington, under the terms and provisions of the statutes of the State of Washington relating to workmen's compensation and industrial insurance. (Rem Rev. Stat. §7675.)"

The appellant's answer further alleged that the injuries of the plaintiff were directly and proximately contributed to by the appellee's own negligence and carelessness.

(b) The Evidence.

There was no substantial controversy as to the manner in which the accident occurred, nor was there

any substantial controversy that the appellee's vision has been impaired. It should be pointed out, however, that the evidence is clear that there has been a substantial improvement in appellee's vision (R. 125) and that such improvement can be expected to continue (R. 126); that there is a possibility, with successful surgery, that vision might be restored to within 5% or 10% of normal (R. 127). The evidence is further clear that even without surgery there is a possibility that the appellee's vision will improve so that he will have, with glasses, 20-60 to a 20-70 vision, which is adequate for many types of industrial employments (R. 129).

In support of the allegations of its first affirmative answer, the appellant made the following offer of proof (R. 274-277):

> "The offer of proof, if the Court please, concerns the matter which is the subject of the legal argument in the session last evening upon which the Court has indicated its ruling. For the record, the defendant offers to prove by the testimony of Jack Radinsky that he is a member of the firm which employed the plaintiff, Oscar V. Haynes; at the time of the accident and at all times prior thereto while in the employ of B. Radinsky & Son the plaintiff was a workman engaged in extra hazardous employment; that at the time of the accident and for a long period of time prior thereto plaintiff was employed as a truck driver handling heavy loads of scrap metals and other materials; that said employment was classified as extra hazardous under the Workman's Compensation Act of the State of Washington; that B. Radinsky & Son at all times prior to February

20, 1948, reported to the Department of Labor and Industries of the State of Washington that the plaintiff was employed by them in extra hazardous employment; and at all times B. Radinsky & Son, the employer of the plaintiff, paid all contributions required to be paid by it to the Industrial Insurance Fund in the State of Washington covering such extra hazardous employment of the plaintiff.

"The defendant further offers to prove by the testimony of J. M. Driskell that he is the treasurer of the Pennsylvania Salt Manufacturing Company of Washington, Incorporated, the defendant in this action, and as such treasurer is in charge of all of the records relating to personnel and to the payment of contributions to the Industrial Insurance Fund of the State of Washington; that at all times since the establishment of defendant's Tacoma plant, defendant has been engaged in extra hazardous employment; that said plant at all times was operated with the use of power driven machinery and constituted a factory, mill and workshop as those terms are defined by the Statutes of the State of Washington; that all employees engaged in the operation of said plant and employed in the yard and premises adjoining the plant were classified as being engaged in extra hazardous employment as defined by the Workmen's Compensation Act of the State of Washington; that all employees of the defendant, including Edwin L. Cliffe, assistant superintendent in charge of production and plant personnel, who participated in any manner in the handling, removing, cleaning or storing of the coil of pipe alleged to have caused plaintiff's injury and who were required to perform any duties whatsoever with respect thereto,

and whose actions or omissions with reference to said coil of pipe are said to have formed the basis of plaintiff's charge of negligence, were employees who were classified as extra hazardous under the Workmen's Compensation Act of the State of Washington.

"That all of said employees at all times prior thereto, including and subsequent to the date of the delivery of said coil of pipe to Frank Powser, were classified under 37-1, defined by the Statutes of the State of Washington as being extra hazardous employment; that at all times the defendant made contributions to the Industrial Insurance Fund covering all of said employees, which contributions were computed according to the rates fixed for such classified employment, and at no time was defendant in default in the payment of said contributions."

The evidence is also undisputed that the coil of pipe which was involved in the accident had been retained by the appellant as a spare piece of equipment available for use in the event that it became necessary (R. 148-150); that it had not been discarded or abandoned as part of the plant equipment until the day that the decision was made to sell it (R. 148).

(c) The Verdict

The case was submitted to the jury solely upon the issue of the appellant's alleged negligence and the appellee's injuries. The jury returned a verdict in favor of appellee in the sum of $35,000.

(d) The Question Involved.

The sole question presented to this court for review is the question of law involving the right of the ap-

pellee to maintain the action against the appellant, that is, whether or not the appellee as a workman covered by the Workmen's Compensation Laws of the State of Washington is limited and confined to a claim for benefits under that law, and that he has no right to maintain any action against the appellant, which was an employer covered by the same law, engaged in extra hazardous employment at the time of the accident.

III. SPECIFICATIONS OF ERROR

1. The district court erred in sustaining the appellee's objection to the appellant's offer of proof of facts in support of its first affirmative defense; the appellant's offer is set forth on pages 274-277 of the record. The ruling of the court sustaining the appellee's objection to the offer of proof is set forth on page 279 of the record (Cf. R. 173-177).

2. The district court erred in refusing to give the following instruction requested by appellant:

> "You are instructed to return a verdict into court in favor of the defendant." (R. 15)

3. The district court erred in its ruling denying plaintiff's motion for a new trial of the issue raised by the defendant's first affirmative defense, to-wit: that the appellee had no right to maintain this action under Section 7675 of Remington's Revised Statutes of Washington (R. 19).

IV. ARGUMENT

Inasmuch as each of the appellant's specifications of error relate to the same question of law, they will be discussed herein together.

(1) Summary Statement of the Appellant's Position:

The appellee did not have the right to maintain this action in that, (a) under the statutes of the State of Washington a workman does not have any common law right to maintain an action to recover damages for injuries received during the course of extra hazardous employment; (b) that the only right which a workman so engaged has to maintain such an action is a statutory right, and that, therefore, the exercise of such right is expressly defined by the statute; (c) That under the express provision of the Washington statute the appellant, as an employer engaged in extra hazardous employment who had made all required contributions to the Industrial Insurance Fund, was granted immunity from action by any workman engaged in extra hazardous employment where the basis of such action was the negligence of appellant's workmen similarly engaged.

(2) The Statutes Involved.

Remington's Revised Statutes of the State of Washington, Sec. 7673, provides as follows:

> "Declaration of police power. The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable.

> The welfare of the state depends upon its industries, and even more upon the welfare of its wage workers. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Remington's Revised Statutes of Washington, Sec. 7674, provides, in part, as follows:

> "There is a hazard in all employment, but certain employments come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term 'extrahazardous' wherever used in this act, to-wit: * * *."

A full enumeration of the works and occupations regarded as extrahazardous follows, specifically including factories, mills and workshops where machinery is used, engineering works, power plants.[1]

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[1]See Appendix p. 35 for full text of Rev. Rem. Stat., Sec. 7674.

Remington's Revised Statutes of the State of Washington, Section 7675, provides, in part, as follows:

"In the sense of this act words employed mean as here stated, to-wit:

"Factories mean undertakings in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and plant of the concern, except when otherwise expressly stated.

"Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control, except when otherwise expressly stated.

"Mill means any plant, premises, room or place wherein machinery is used, any process of machinery, changing, altering or repairing any article or commodity for sale or otherwise, together with the yards and premises which are a part of the plant, including elevators, warehouses and bunkers, except when otherwise expressly stated.

"Mines mean any mine where coal, clay, ore, mineral, gypsum or rock is dug or mined and underground.

"Quarry means an open cut from which coal is mined, or clay, ore, mineral, gypsum, sand, gravel or rock is cut or taken for manufacturing, building or construction purposes.

"Engineering work means any work of construction, improvement or alteration or repair of buildings, structures, streets, highways, sewers, street railways, railroads, logging roads, interurban railroads, harbors, docks, canals, electric, steam or water power plants, telegraph and telephone plants and lines, electric light or power lines, and includes any other works for the construction, alteration or repair of which machinery driven by mechanical power is used, except when otherwise expressly stated.

"Except when otherwise expressly stated, employer means any person, body of persons, corporate or otherwise, and the legal personal representatives of a deceased employer, all while engaged in this state in any extrahazardous work, by way of trade or business, or who contracts with one or more workmen, the essence of which is the personal labor of such workman or workmen, is extrahazardous work."

Remington's Revised Statutes of Washington, Section 7675, further provides in part as follows:

"Workman means every person in this state, who is engaged in the employment of any employer coming under this act whether by way of manual labor or otherwise, in the course of his employment: Provided, however, that if the injury to a workman is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he take under this act, the cause of action against such other shall be assigned to

the state for the benefit of the accident fund; if the other choice is made, the accident fund shall contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case: *Provided, however, that no action may be brought against any employer or any workman under this act as a third person if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under this act.*" (Emphasis ours)

(3) Discussion of Authorities.

A proper interpretation of the last quoted portion of Remington's Revised Statutes of Washington, Section 7675, and particularly the portion thereof which has been italicized as above, is determinative of the issue involved in this case.

The statute as quoted has been in effect since 1929. As originally enacted the Industrial Insurance Act of the State of Washington (Laws of 1911, Ch. 74, Sec. 3, p. 346) provided that if a workman while away from the plant of his employer sustained injuries through the negligence of one not in the same employ, he could elect to take under the act or sue the person causing his injuries. Under the original enactment it made no difference that the tort feasor was an employee engaged in extrahazardous employment. Under that original enactment if a workman sustained injuries even though engaged in extrahazardous employment, at some place other than the plant of his employer, he had a right to sue the tort feasor even

though that tort feasor was an employer or workman engaged in extrahazardous employment.

The workman's right to maintain such an action was preserved subject to the limitation mentioned in the original act until 1927. Under the provisions of the Laws of 1927 Chapter 310, Sec. 2, p. 815, a workman was given the right to elect to claim benefits under the Industrial Insurance Act or to sue a third party tort feasor without the limitation that the injury be sustained away from the plant of his employer. Under the 1927 Act, therefore, if one who was not in the same employ negligently injured a workman, he was liable in an action for damages if the injured workman elected to proceed against him irrespective of the place where the injury occurred.

However, the unlimited right of election given by the 1927 Act was changed by the amendment thereof in 1929 (Laws of 1929, Ch. 132, p. 325, Sec. 1, which is the law at the present time (R.R.S. Sec. 7675) *supra*). As stated by the Washington Supreme Court in the case of *Koreski v. Seattle Hardware Company*, 17 Wn.(2d) 421, 135 P.(2d) 860, p. 428:

> "The Workmen's Compensation Act affords a right of action to certain workmen for personal injuries sustained under certain circumstances, and withhold the right of action from him in other situations *depending upon the status of the person whose negligence causes the injuries.*"

The original industrial insurance act of the State of Washington (Laws of 1911, Ch. 74, p. 345) was first considered by the Washington Supreme Court in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash.

156, 117 Pac. 1101, wherein the court held that the act was founded upon the basic principle that certain defined industries designated in the Act as extra-hazardous should be made to bear the financial losses sustained by workmen engaged therein through personal injuries; that the purpose of the act was to furnish a remedy which would reach every injury sustained by a workman engaged in any such industry and make a sure and certain award therefor, bearing the full proportion to the loss sustained regardless of the manner in which the injury was received.

In the case of *Stertz v. Industrial Ins. Commission*, 91 Wash. 588, 158 Pac. 256, the court said:

> "Ours is not an employer's liability act. It is not even an ordinary compensation act. It is an industrial insurance statute. Its administrative body is entitled the industrial insurance commission. All the features of an insurance act are present."

In the case of *Boeing Aircraft Co. v. Department of Labor & Industries*, 22 Wn.(2d) 423, 156 P.(2d) 640, the question before the court was whether or not one of two industries should be charged with the costs of a particular accident. An airplane owned and operated by the Boeing Aircraft Company while on a trial flight crashed into the meat packing plant of Frye & Co. of Seattle, killing and injuring many employees of the meat packing plant as well as killing the members of the crew. Both the Boeing Company and Frye & Company were contributors to the industrial insurance fund, the aircraft company being contributor under Class 34-3 and Frye & Co. a contribu-

tor under Class 43-1. Inasmuch as under the Act the premium rates for industrial insurance were based upon loss experience in each defined industry, it became necessary to determine whether the amount of the loss paid should be charged to the airplane industry or to the meat packing industry. The court held that each class was liable for the costs and losses sustained in their respective classes, and that the Department of Labor & Industries was not authorized to transfer the charges for death and injuries suffered by the employees of the meat packing plant from the meat packing class to the airplane manufacturing class.

In an extensive and well considered opinion the court reviewed the purpose, policy, and history of the industrial insurance system of the State of Washington, and expressed certain well defined and well accepted rules.

On page 434 of the Reports (22 Wn.(2d)) the court says:

> "As stated above, prior to 1927, an employee injured at his employer's plant had no right of action against any third person. From 1927 to 1929, the employee covered by the act, if injured either away from or at the plant, could elect to take under the statute or sue a negligent third party. Since 1929 an injured employee could sue a negligent third person only if such person was not an employee or employer under the coverage of the statute. * * *
>
> "In 1929 the privilege was withdrawn as to other workmen and the employers likewise under the statute. Industry acquired, under the 1929

statute, an immunity from common-law actions with potentially larger damage claims in exchange for its assumption, in the aggregate, of limited responsibility to its employees without fault."

Again on page 435 the court states as follows:

"Under the workmen's compensation act, all civil cases of action for personal injuries sustained in an industrial accident arising out of extrahazardous employment are abolished except in those cases where the act expressly preserves or creates a right of action; and in such cases the rights of action are purely statutory, and not common-law rights. *An employer who complies with the terms of the workmen's compensation act is entitled to all of its benefits, including immunity from liability for negligently injuring the employee of another employer. A workman, under the workmen's compensation act at the time he was injured through the negligence of an employee of another company, may not maintain an action against the company the negligence of whose employee or employees caused the injuries, where that company had complied with the provisions of the act which affords immunity from suit in such circumstances.*" (Citing *Koreski v. Seattle Hardware Co., supra*) (Emphasis ours)

It is submitted that the existing statute is intended to afford immunity to an employer engaged in extrahazardous employment where the injury results from the negligence of his employee during the course of such extrahazardous employment, where the employer has complied with the provisions of the industrial insurance act. As stated by the court in *Boeing Aircraft Company* case, *supra*, the immunity afforded by the

1929 statute is in exchange for the assumption by employers in the aggregate of responsibility to employees. It is further clear that the Washington workmen's compensation law is and always has been an insurance law and as modified by the 1929 enactment is designed to afford insurance both to employers and employees against the losses attendant by injuries received by employees during the course of extrahazardous employment.

The proviso of the 1929 amendment, that is, "Provided, however, that no action may be brought against any employer or any workman under this Act as a third person if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under this act," has been discussed and analyzed in the following decisions of the Washington Supreme Court:

Robinson v. McHugh, 158 Wash. 157, 291 Pac. 330.

That case was one where an employee of the city of Tacoma, working in the Light Department, was injured, and elected to sue the respondents as the tort feasor. The accident occurred on the 19th day of April, 1929, but the action was not commenced until subsequent to the effective date of the statute (Rem. Rev. Stat. 7675) as amended by the Laws of 1929, which included the above proviso, to the effect that no action may be brought against any employer or any workman under the Act if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under the Act. It appeared that the defendants were contributing to the Workmen's Compensation fund and at the time of the

injury were engaged in an extrahazardous occupation. The defendant contended that the amendment had no application because the injury had occurred prior to the effective date of the Act and that the plaintiff's rights were covered by the Workmen's Compensation Act as it existed at the time of the injury. The court in holding that the 1929 amendment applied to all actions brought after its effective date held that the right of action existed only by virtue of the statute, that there could be no vested right therein, and that the Legislature might take away the right at any time. The court concluded that the defendants being employers engaged in extrahazardous employment at the time of the injury, were exempted from liability under the provisions of the 1929 amendment of the Workmen's Compensation Act.

The case of *Denning v. Quist*, 160 Wash. 681, 296 Pac. 145, was one where the court followed the rule of the case of *Robinson v. McHugh*, *supra*, and held that the right of a workman injured by the negligence or wrong of another not in the same employ, to elect whether to take under the Workmen's Compensation Act, or seek a remedy against such other or his employer, as given by the 1927 amendment to Rem. Rev. Stat. Sec. 7675, did not re-establish the common law remedy abolished by the Workmen's Compensation Act. The court went on to say:

> "This amendment, however, did not re-establish in favor of the injured workman any common law right but simply enlarged his existing statutory right. This right being purely statutory, it was competent for the legislature to limit the same, as was accomplished by the 1929 amend-

ment, *supra*, and we are satisfied that the correct rule was laid down by this court in the case of *Robinson v. McHugh, supra.*"

In the case of *O'Brien v. Northern Pac. R.R. Co.*, 192 Wash. 55, 72 P.(2d) 602, the plaintiff sustained injury as the result of a collision of a truck which he was operating with a train operated by the defendant. The plaintiff was entitled to compensation under the Industrial Insurance Act, but elected to sue the defendant for damages alleging that the collision was caused by the negligent operation of the train which at the time was engaged in interstate commerce. The defendant urged that by reason of the proviso of Rem. Rev. Stat. Sec. 7675 it was immune from an action for negligence by the plaintiff who was an employee of another engaged in extrahazardous employment. The court held against the defendant's contention but solely upon the ground that being engaged in the operation of an interstate railroad, it did not contribute to the Workmen's Compensation fund nor was it amenable to the provisions of the Workmen's Compensation Act with respect to its interstate operations. The court states the rule as follows:

"Construing the above quoted proviso of Rem. Rev. Stat. §7675, in the light of the industrial insurance act as a whole, we think a workman, engaged in extrahazardous employment, is not precluded from maintaining an action for negligence against one not his employer, *unless such a one is amenable to the act and a contributor to the 'accident fund.'* Our conclusion finds support, at least by implication, in the decisions of this court in the cases of *Robinson v. McHugh*, 158 Wash. 157, 291 Pac. 330, and *Denning v.*

Quist, 160 Wash. 631, 296 Pac. 145. In each case the defendant (a third person employer) was held immune from suit under the proviso of Rem. Rev. Stat., §7675. But in each opinion the fact is stressed that the defendant was a contributor to the 'accident fund'." (Emphasis ours)

Weiffenbach v. Seattle, 193 Wash. 528, 76 P.(2d) 589.

The plaintiff sued the City of Seattle to recover damages on account of injuries sustained while engaged in measuring the roof of a building; he came in contact with a current of electricity passing through a metal tape measure which he was using; the electricity came from a high voltage wire which was part of the city's light and power system. It was alleged that the city was negligent in that it had permitted its wire to sag down over the roof in contravention of its own regulations which provide that the high voltage wires should clear a building by six feet.

The city defended upon the ground that under the proviso of Rem. Rev. Stat. Sec. 7675, it was engaged in extrahazardous employment under the Workmen's Compensation Act and was, therefore, immune from suit by the plaintiff who was himself engaged in extrahazardous work; the plaintiff contending that the city was not such an employer because the phrase "in the course of any extrahazardous employment" necessarily implies the presence of an employee doing some act at the time and place of the accident, together with an active participation on his part in the doing of some act; that a merely passive negligence, being a nondelegable act or condition on the part of an em-

ployer, such as he contends is found in this case does not afford a basis for the exemption. The court overruled the plaintiff's contention and held that the city in the maintenance of its high voltage wire was actively engaged in an extrahazardous employment at the time of the accident; *that the city was required to and did pay into the industrial insurance fund assessments levied upon its payroll as its ratable contribution for the protection not only of its employees but of the whole body of employees in the state engaged in extrahazardous industry*, and that while no workman of the city was engaged in work on the high voltage line at the time and place of the accident, it was assumed that the city had workmen and others engaged in the maintenance and repair of its extensive distributing system and that some of them were always engaged somewhere on the system.

In its opinion the court explains the theory of the 1929 Proviso in the following language:

> "The immunity from a suit here involved *must have been granted by the 1929 legislature as a reciprocal compensation to industry for the burden it assumes as an aggregate unit in providing, in the language of the statute*, '* * * sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents * * * regardless of questions of fault * * *'." (Emphasis ours)

In the case of *Pryor v. Safeway Stores, Inc.*, 196 Wash. 382, 83 P.(2d) 241, the court again recognizes the rule but held that the third party employer was not exempt under the proviso of Rem. Rev. Stat. §7675

where such third party employer was not engaged in extrahazardous employment but had brought itself under the Act by the elective adoption provisions of Rem. Rev. Stat. Sec. 7696.

In the case of *Reeder v. Crewes*, 199 Wash. 40, 90 P.(2d) 267, the court held that the immunity afforded by the proviso of Rem. Rev. Stat. Sec. 7675 would not apply to a third party employer who was in default in the payroll reports and in the payment of premiums required under the Act even though such third party employer was engaged in extrahazardous employment.

In the case of *Gephart v. Stout*, 11 Wn.(2d) 184, 118 P.(2d) 801, the plaintiff sought to recover damages for personal injuries sustained through a collision between a motorcycle which he was riding and an automobile owned and operated by the defendant. The plaintiff's injuries occurred while the plaintiff was in the course of his employment which was extrahazardous; the defendant defended upon the ground that he was the owner of an automobile freight transportation business which was concededly classified as extrahazardous; that he had paid premiums to the Department of Labor and Industries on the basis of his reported payrolls although he did not carry himself on such payrolls for employee benefits. There was nothing in the record to indicate that the defendant was doing anything in connection with the operation of his motor freight business at the time of the collision. He was driving a five passenger sedan automobile and the only evidence was that he was on his way to the Carpenters' Union Hall at the time of the accident. The court held that the defendant

was not in the course of any extrahazardous employment at the time of the accident and was therefore not entitled to the immunity afforded by the proviso of Rem. Rev. Stat. Sec. 7675. The court reviews the *Pryor* case and its other decisions including the cases cited in this brief, and then states the rule which we submit is clearly applicable and decisive of the case at bar; the court says:

> "While the foregoing cases are not directly in point, they do clearly establish two essential requirements which an employer must meet to entitle him to immunity from suit by a workman not in his employ; (1) the employer must be a contributor to the workmen's compensation fund; and (2) *at the time of the accident, the employer must be in the course of some extrahazardous employment* under the industrial insurance act. *To satisfy the second requirement, the negligent act or omission which is the basis of the workman's cause of action must arise out of, or be in some way connected with, an extrahazardous employment or business then being carried on by the employer.*" (Latter emphasis ours)

In the case of *Koreski v. Seattle Hardware Company*, 17 Wn.(2d) 421, 135 P.(2d) 860, the court directly applied the statute and held that the right of a workman injured by the negligence of another not in the same employ, to elect whether to take under the Act or sue the person causing the injury, was limited by the laws of 1929, p. 325, Section 1, which provided that no such action may be brought against any employer or workman if at the time of the accident such employer or workman was in the course of extrahazardous employment. In that case the plaintiff

who was the president and general manager of an electric motor service company was injured while personally employed in repairing a power driven machine then being operated in the plant of the defendant. The injury was caused by the defendant being swept off of the catwalk of a crane and hurled to a warehouse floor by coming into contact with a girder which was being passed by the crane. The court held that the proviso to Rem. Rev. Stat. Sec. 7675 was clearly applicable, the court reviewing the cases, including the cases cited in this brief, and held as follows:

> "Those who comply with the terms and conditions of the workmen's compensation act are entitled to all the benefits of the act and subject to all of the liabilities of the act. As appellant complied with the terms of the workmen's compensation act, immunity from liability for negligently injuring respondent, who was the employee of another employer, is a benefit to which appellant is entitled under the act."

It cannot be disputed that the facts set forth in appellant's offer of proof (R. 274-277) are that the appellant was engaged in the operation of a factory, workshop and mill within the definition of Remington's Revised Statutes of Washington, Sec. 7674 and 7675.

It is also indisputable that the removal, handling, sale and transportation of the coil of pipe which is alleged to have been the instrumentality causing the appellee's injuries was a part of the operation of the factory, workshop, mill and the yards and premises which were a part thereof, as conducted by the appellant in its plant at Tacoma, Washington. There is

no question but that under said offer of proof the appellee was a workman engaged in extrahazardous employment and that the appellee was entitled, and still is entitled, to receive compensation from the industrial insurance fund of the State of Washington. There is no question but that under the offer of proof the appellant was a contributor to the industrial insurance fund of the State of Washington, and that all the employees of the defendant who participated in any manner in the handling, removal, cleaning, storing, sale or delivery of the coil of pipe were engaged in extrahazardous employment as defined by the Workmen's Compensation Act of the State of Washington, and that the appellant had made contributions to the industrial insurance fund covering all of said employees which contributions were computed according to the rates fixed for the employment classification of each of such employees.

Under these facts it is submitted that the test defined in the opinion of the court in the case of *Gephart v. Stout*, 11 Wn.(2d) 184, 118 P.(2d) 801, *supra*, is clearly applicable; (1) the appellant was a contributor to the workmen's compensation fund; (2) at the time of the accident the appellant was in the course of extrahazardous employment under the industrial insurance act in that the negligent act or omission which formed the basis of appellee's cause of action certainly was connected with the extrahazardous employment carried on by the appellant.

The latter proposition is conclusively established by the appellee's allegations of negligence. These allega-

tions which are completely set forth on page 7 of the record and heretofore in this brief consist of:

1. Failing to ascertain that the corrosive substances had been removed from the coil of pipe prior to its removal from the premises of the appellant.

2. Failing to remove all corrosive and injurious substances from said coil of pipe immediately upon removing the coil of pipe from the appellant's operating system.

3. Selling and delivering the coil of pipe without having warned of the presence of dangerous substances in the coil of pipe.

It is axiomatic that a corporation such as the appellant acts only through its employees. Under the appellant's offer of proof the only employees who had or would have had anything whatsoever to do with, (1) ascertaining whether the corrosive substances had been removed from the coil prior to its sale; or (2) whose duty it was to remove such corrosives, or (3) who sold or delivered the coil without warning of the presence of such substances, are all employees who were engaged in extrahazardous employment, who were classified as such upon the records of the appellant and the Deparatment of Labor and Industries of the State of Washington, and for whom contributions had been made by the appellant to the industrial insurance fund upon the basis of such extrahazardous classification.

It is submitted that the language of the 1929 amendment to Remington's Revised Statutes of Washington, Section 7675, definitely provides that where

the injury to a workman engaged in extrahazardous employment is caused by the negligence occurring during the course of extrahazardous employment by another employer or his workmen, *the latter employer is afforded immunity* from claims by the injured workman and that the latter rights are confined to the benefit afforded by the workmen's compensation law.

The whole argument of the appellee in the District Court, and the decision of the District Court upon this issue of law as indicated on pages 173-175 of the record, are based upon the proposition that the offending coil of pipe at the time of the accident had been disconnected from the appellant's operating plant and had been discarded. Even though the evidence is clear that the particular coil of pipe had not been discarded until the decision of Mr. Cliffe to sell it (R. 148-150) the appellee's argument in the trial court, and the trial court's decision is based obviously upon an erroneous theory which is not sustained by any of the decisions of the Washington Supreme Court and which is contrary to them. The decision of the District Court apparently is based upon the dicta contained in the case of *Weiffenbach v. Seattle,* 183 Wash. 528, 76 P.(2d) 589, *supra,* to the effect that if the city had abandoned the use of the wire for the transmission of electricity so that it was no longer performing any function as a part of its operating system, it would then be no longer a part of the industry or the extrahazardous employment in which the city was then engaged.

It is submitted that even if this dicta had any force as a precedent, the situation which it contemplates is

entirely different from that of the case at bar. The situation contemplated by the dicta is one wherein the negligence which would form the basis for an action would consist of the maintenance of a dangerous condition by the city which would be wholly divorced from any extrahazardous industrial operation in which it might then be engaged. The situation contemplated by the dicta would be the equivalent of the city permitting an obstruction or an unprotected ditch to remain in a city street. Surely it could not be said in such a case that there would be any connection between the city's negligence and any extrahazardous industrial operation in which the city might be engaged. *In the case at bar, the situation is entirely different; the negligence which is the basis for the appellee's claim was negligence which occurred during the course of appellant's operation of an extrahazardous industrial plant.* In the instant case the appellee's claim is not based upon the fact that the coil of pipe was permitted by the defendant to be placed in the salvage yard of Mr. Frank Powser. Neither is the appellee's claim based upon the act of loading such coil of pipe upon the truck operated by appellee; neither is the appellee's claim based upon the act of pounding the coil of pipe with a sledge hammer resulting in its bursting. If there was any negligence on the part of the appellant's employees it occurred at or prior to the time that the coil of pipe was delivered to Mr. Frank Powser. Such acts of negligence if they occurred, were the acts of employees who were engaged in extrahazardous occupations during the course of extrahazardous employment. The difference

between the instant case and the suppositious case presented by the dicta in the Weiffenbach decision is obvious indeed; under no circumstances should such dicta be considered as being a conclusion of the legal question presented in the case at bar.

Whatever force the Weiffenbach dicta may have had must be considered as having been dissipated in the light of the strong and positive language of the Washington Supreme Court in the case of *Boeing Aircraft Company v. Department of Labor and Industries*, 22 Wn.(2d) 423, wherein the very positive rule was expressed that:

> "a workman under the Workmen's Compensation Act at the time he was injured through the negligence of the employee of another company may not maintain an action against the company, *the negligence of whose employee or employees caused the injury*, where that company had complied with the provisions of the act which affords immunities of suit from such circumstances." (Emphasis ours)

V. SUMMARY AND CONCLUSION

It is submitted that the following propositions of law are established by the provisions of the Workmen's Compensation Law of the State of Washington, and the decisions of the Washington Supreme Court herein discussed, as follows:

1. That the Workmen's Compensation Law of the State of Washington is not merely an employer's liability act, nor even an ordinary compensation act; it is an industrial insurance act designed to insure *both employees and employers* engaged in extrahaz-

ardous employment and to remove entirely all common-law rights of action and all common-law defenses arising from industrial injuries, with the view of making certain that injured workmen shall receive compensation irrespective of all questions of negligence.

2. In any case where an injury to a workman engaged in extrahazardous employment results, during the course of such employment from the negligence of another employer or his workmen, likewise engaged in extrahazardous employment, the injured workman does not have any right to maintain an action against the offending employer or his workmen, but is confined to his remedy under the Workmen's Compensation Law.

3. That the determinative test in each case is not where the injury occurred, or necessarily when the injury occurred, but rather *by whose negligence was the injury caused.* If it was caused by the negligence of an employer, engaged in extrahazardous employment, or by his workmen so engaged, then the injured workman has no common-law right and no statutory right to proceed against the offending employer.

4. In such case the injured workman is entitled to and is confined to the benefits afforded by the Workmen's Compensation Law of the State of Washington. ,The appellee, with whose misfortune everyone must be most sympathetic, is entitled to receive from the industrial insurance fund the benefits which can be granted under the Workmen's Compensation Act. However, to permit the appellee to maintain this

action against the appellant would do violence to the express provisions of the statute, and the whole theory underlying the system of industrial insurance of the State of Washington.

It is submitted that the judgment of the District Court should be reversed, and that the cause should be remanded for a new trial wherein the appellant would be permitted to prove the allegations of its first affirmative answer.

Respectfully submitted,

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APPENDIX

Remington's Revised Statutes of Washington, Section 7674 provides as follows:

"§7674. Extrahazardous employment. There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term 'extrahazardous' whereever used in this act, to wit:

"Factories, mills and workshops where machinery is used; printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gasworks, waterworks, reduction-works, breweries, elevators, wharves, docks, dredges, smelters, powder-works; laundries operated by power; quarries; engineering works; logging, lumbering, and shipbuilding operations; logging, street and interurban railroads; buildings being constructed, repaired, moved or demolished; telegraph, telephone, electric light or power plants or lines, steam-heating or power plants, steamboats, tugs, ferries and railroads, general warehouse and storage; transfer, drayage and hauling; warehousing, and transfer; fruit warehouse and packing-houses. If there be or arise any extrahazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established, shall be, until fixed by legislation, determined by the department here-

inafter created, upon the basis of the relation which the risk involved bears to the risk classified in section 7676; Provided, however, the following operations shall not be deemed extrahazardous within the meaning, or be included in the enumeration, of this section to wit: using power-driven coffee-grinders in wholesale or retail grocery stores; using power-driven washing-machines, in establishments selling washing-machines at retail; using power-driven machinery in shoe repair-shops; using computing machines in offices; using power-driven taffy-pullers in retail candy stores; using power-driven milkshakers in establishments operating soda fountains; the duties of employees in restaurants; using power-driven hair-cutters in barbershops; using power-driven machinery in beauty parlors; using power-driven machinery in optical stores; driving automobiles, exclusive of trucks mentioned in class 11-1 of section 7676 of Remington's 1927 Supplement.

"The director of labor and industries through and by means of the division of industrial insurance shall have power, after hearing had upon its own motion, or upon the application of any party interested, to declare any occupation or work to be extrahazardous and to be under this act. The director of labor and industries shall fix the time and place of such hearing and shall cause notice thereof to be published once at least ten days before the hearing in at least one daily newspaper of general circulation, published and circulated in each city of the first class of this state. No defect or inaccuracy in such notice or in the publication thereof shall invalidate any order issued by the director of labor and industries after hearing had. Any person affected shall

have the right to appear and be heard at any such hearing. Any order, finding or decision of the director of labor and industires made and entered under the foregoing provisions of this act shall be subject to review within the time and in the manner specified in section 7697, and not otherwise. (L. '27, p. 813, §1. Cf. L. '21, p. 719, §1; L. '19, p. 340, §1; L. '11, p. 346, §2.)"